RECORD AND BRIEFS

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No. 15-1439

In the Supreme Court of the United States

CYAN, INC., ET AL., PETITIONERS

v.

BEAVER COUNTY EMPLOYEES RETIREMENT FUND, ET AL.

ON WRIT OF CERTIORARI
TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA,
FIRST APPELLATE DISTRICT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

NOEL J. FRANCISCO
Solicitor General
Counsel of Record
MALCOLM L. STEWART
Deputy Solicitor General
ALLON KEDEM
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether state courts lack subject-matter jurisdiction over "covered class actions," 15 U.S.C. 77v(a), that allege only claims under the Securities Act of 1933.

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INTEREST OF THE UNITED STATES

The United States, through the Securities and Exchange Commission and the Department of Justice, administers and enforces the federal securities laws. This case presents the question whether Congress, in enacting the Securities Litigation Uniform Standards Act of 1998 (SLUSA), Pub. L. No. 105-353, 112 Stat. 3227, withdrew state-court jurisdiction over certain private suits that allege violations of the federal securities laws. The United States has a strong interest in ensuring that the principles applied in private securities actions promote the purposes of the securities laws without unduly burdening the efficient operation of the securities markets. At the Court's invitation, the United States filed a brief as amicus curiae at the petition stage of this case.

STATEMENT

1. In 1995, prompted by concern that the salutary purposes of private securities litigation were being "undermined by * * * abusive and meritless suits," H.R. Conf. Rep. No. 369, 104th Cong., 1st Sess. 31 (1995), Congress enacted the Private Securities Litigation Reform Act of 1995 (PSLRA), Pub. L. No. 104-67, 109 Stat. 737. The PSLRA established various reforms, including heightened pleading standards and an automatic stay of discovery, that apply to certain private securities-fraud actions. See, *e.g.*, 15 U.S.C. 77z-1.

After the PSLRA was enacted, however, Congress observed that "a number of securities class action lawsuits have shifted from Federal to State courts," which "has prevented that Act from fully achieving its objectives." SLUSA § 2(2) and (3), 112 Stat. 3227. Congress therefore enacted SLUSA to "prevent certain State private securities class action lawsuits alleging fraud from being used to frustrate the objectives of the [PSLRA]." *Id.* § 2(5), 112 Stat. 3227. Congress sought to accomplish that goal by creating "national standards for securities class action lawsuits involving nationally traded securities, while preserving the appropriate enforcement powers of State securities regulators." *Ibid.*; see *Merrill Lynch, Pierce, Fenner & Smith Inc.* v. *Dabit*, 547 U.S. 71, 82 (2006).

SLUSA amended the Securities Act of 1933 (1933 Act), 15 U.S.C. 77a *et seq.*, and other provisions of the securities laws in three respects that are relevant here. First, Congress barred private plaintiffs from pleading certain types of securities-fraud class actions under state law. Section 77p(b) of Title 15 provides that "[n]o covered class action based upon the statutory or common law of any State or subdivision thereof may be

maintained in any State or Federal court by any private party alleging" either "(1) an untrue statement or omission of a material fact in connection with the purchase or sale of a covered security" or "(2) that the defendant used or employed any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security." 15 U.S.C. 77p(b); see 15 U.S.C. 77p(d) (providing that Section 77p(b) is inapplicable in certain circumstances). Section 77p(f)(2) defines the term "covered class action" to include certain suits in which damages are sought on behalf of more than 50 people. 15 U.S.C. 77p(f)(2). The term "covered security" is defined to include a security listed on a regulated U.S. national exchange. See 15 U.S.C. 77p(f)(3) (cross-referencing 15 U.S.C. 77r(b)). Taken together, those provisions prevent any court, state or federal, from hearing state-law securities class actions alleging false statements, omissions, or deceptive conduct in connection with a covered security.

Second, Congress recognized that plaintiffs might attempt to bring such actions in state court, and it was apparently concerned that state courts would not adequately enforce Section 77p(b)'s limitation. SLUSA therefore amended the 1933 Act to permit removal of such actions to federal court. Under Section 77p(c), "[a]ny covered class action brought in any State court involving a covered security, as set forth in subsection (b) of this section, shall be removable to the Federal district court for the district in which the action is pending, and shall be subject to subsection (b)." 15 U.S.C. 77p(c). SLUSA also addressed the removal of such suits by amending language in the 1933 Act's general jurisdictional provision, 15 U.S.C. 77v(a). That provision had formerly barred removal of all cases arising under the

1933 Act, but SLUSA carved out an exception for removal of covered class actions by adding the language italicized below. See 15 U.S.C. 77v(a) ("*Except as provided in section 77p(c) of this title*, no case arising under this subchapter and brought in any State court of competent jurisdiction shall be removed to any court of the United States.") (emphasis added).

Third, Congress amended the language in Section 77v(a) that provides for concurrent federal- and state-court jurisdiction over suits to enforce the 1933 Act. As amended by SLUSA, Section 77v(a) provides that "[t]he district courts of the United States and the United States courts of any Territory shall have jurisdiction of offenses and violations under this subchapter * * * and, concurrent with State and Territorial courts, *except as provided in section 77p of this title with respect to covered class actions*, of all suits in equity and actions at law brought to enforce any liability or duty created by this subchapter." 15 U.S.C. 77v(a) (emphasis added); see SLUSA § 101(a)(3), 112 Stat. 3230 (SLUSA amendment adding italicized language). This brief refers to the italicized language as the "except" clause.

2. In 2014, respondents brought a class-action suit against petitioners in California superior court.[1] The complaint alleges violations of provisions of the 1933 Act that govern disclosures made in registration statements and prospectuses. See J.A. 13 (citing 15 U.S.C. 77k, 77*l*(a)(2), and 77*o*); see generally *Gustafson* v. *Alloyd Co.*, 513 U.S. 561, 570-571 (1995). The complaint does not allege any state-law claims. See J.A. 13.

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[1] The parties appear to agree that the suit is a "covered class action," and that the securities in question are "covered securities," within the meaning of SLUSA. See Pet. Br. 14.

a. Petitioners moved for judgment on the pleadings for lack of subject-matter jurisdiction. On October 23, 2015, the superior court denied the motion. See Pet. App. 1a-6a. The court explained that its "hands [were] tied by" the decision in *Luther* v. *Countrywide Financial Corp.*, 125 Cal. Rptr. 3d 716 (Cal. Ct. App.), cert. denied, 565 U.S. 1080 (2011). Pet. App. 5a; see *id.* at 6a.

In *Luther*, the California Court of Appeal (Second District) held that state courts' concurrent jurisdiction over covered class actions alleging only claims under the 1933 Act had "survived the amendments" that SLUSA had made to the federal securities laws. 125 Cal. Rptr. 3d at 721. The defendant in *Luther* argued that 15 U.S.C. 77v(a), which establishes concurrent jurisdiction in state and federal courts "except as provided in section 77p of this title with respect to covered class actions," *ibid.*, should be read to refer to "the definition of covered class action in section 77p(f)(2)" and thus to "create[] an exception to concurrent jurisdiction for *all* covered class actions." 125 Cal. Rptr. 3d at 719. The court rejected that argument, explaining that "Section 77v does not say 'except as provided in section 77p(f)(2),' the definition of covered class action. Instead, it refers to all of section 77p, not just the definitional provision." *Id.* at 721; see *id.* at 721-722.

The California Court of Appeal in *Luther* stated that it would "look to all of section 77p[] and see what it provides 'with respect to covered class actions.'" 125 Cal. Rptr. 3d at 720. The court determined, however, that Section 77p does not "provide[]" anything that is relevant to a covered class action alleging only federal-law claims. *Ibid.*; see *ibid.* (stating that "[t]his case, which is not based on the statutory or common law of any state, is not precluded" under Section 77p(b)). The

court acknowledged that SLUSA "was enacted to stem the shift from federal to state courts and to 'prevent certain State private securities class action lawsuits alleging fraud from being used to frustrate the objectives of' the [PSLRA]." *Id.* at 722 (quoting *Dabit*, 547 U.S. at 82). It reasoned, however, that "an intent to prevent *certain* class actions does not tell us that this class action, or all securities class actions[,] must be brought in federal court." *Ibid.*

b. On December 2, 2015, petitioners filed a petition for a writ of mandate, prohibition, or other relief in the California Court of Appeal (First District). See Pet. 10. The court denied the petition without an opinion. See Pet. App. 15a.

On December 18, 2015, petitioners filed a petition for review in the Supreme Court of California. See Pet. 10. That petition, too, was denied without opinion. See Pet. App. 16a.

SUMMARY OF ARGUMENT

I. Under Section 77v(a), state courts have concurrent jurisdiction over suits that assert claims under the 1933 Act, "except as provided in section 77p of this title with respect to covered class actions." Because nothing in Section 77p divests state courts of jurisdiction over this covered class action, which asserts only 1933 Act claims, the courts below correctly allowed respondents' suit to proceed.

A. 1. Petitioners read the "except" clause as withdrawing jurisdiction from state courts over cases in which only 1933 Act claims are asserted. Although that reading would preserve the "except" clause as a limit on the concurrent jurisdiction of state courts, it cannot be squared with the statutory text. When Congress

states that a general principle applies "except as provided in" a particular provision, that language is naturally understood to mean that the cross-referenced provision is an exception to the general principle. Indeed, Congress has used the phrase ("except as provided") in precisely that manner elsewhere in the same chapter of Title 15. See, *e.g.*, 15 U.S.C. 77k(f); 15 U.S.C. 77p(a); 15 U.S.C. 77z-2(c). Nothing in Section 77p, however, even arguably "provide[s]" an exception to the general rule of concurrent state-court jurisdiction over a suit like this one, which asserts only federal-law claims.

2. Petitioners argue (Br. 18) that their interpretation is necessary to avoid a "gaping hole in the regulatory scheme" that would arise if Section 77v(a) were interpreted to permit state courts to exercise jurisdiction over class actions that assert claims only under the 1933 Act. Their argument, however, is based on the faulty assumption that no other provision added by SLUSA addresses class actions of that type. As explained below, Section 77p(c) is properly understood to permit removal of such suits to federal court, where they will be subject to the substantive and procedural safeguards that the PSLRA created.

3. Petitioners' interpretation of Section 77v(a)'s "except" clause would also create practical anomalies. The clause, as they read it, applies to a range of 1933 Act suits that is broader than the range of state-law suits covered by SLUSA's preclusion provision, Section 77p(b). Section 77p(b) applies only to cases that involve both a "covered security" and certain specified kinds of misconduct. Yet petitioners interpret the "except" clause as withdrawing state-court jurisdiction over certain 1933 Act suits that lack those attributes. There is

no evident reason that Congress would have wanted the "except" clause to sweep more broadly than Section 77p(b) in those respects. Petitioners offer various explanations for the mismatch that results from their theory, but none is persuasive.

B. There are at least two possible explanations for Congress's enactment of the "except" clause. Congress may have been concerned that Section 77v(a), by authorizing concurrent jurisdiction over "suits" and "actions" brought to enforce the 1933 Act, might be misconstrued as superseding the limitations imposed by Section 77p for "mixed" cases involving both state- and federal-law claims. Or Congress may have added the "except" clause in an abundance of caution, without having in mind any particular scenario in which Sections 77p and 77v(a) might conflict. In any event, the "except" clause is best read not to withdraw state-court jurisdiction over cases like this one, even absent a satisfying explanation for why Congress wrote it.

II. Petitioners contend that their reading of Section 77v(a)'s "except" clause, under which state courts may not adjudicate covered class actions asserting claims under the 1933 Act, is necessary to prevent circumvention of the PSLRA's substantive and procedural protections. Petitioners are correct that a federal forum must remain available in order for those protections to be efficacious. But the "except" clause is not the only statutory mechanism for ensuring such access in 1933 Act suits.

A. SLUSA amended Section 77v(a)'s anti-removal provision, which now prevents removal of 1933 Act suits "[e]xcept as provided in Section 77p(c) of this title." Section 77p(c), in turn, authorizes removal of "[a]ny covered class action brought in any State court

involving a covered security, as set forth in subsection (b)." Together, those provisions are best understood as permitting removal of any covered class action—whether the asserted claims arise under state or federal law—that contains allegations of the type specified in Section 77p(b)(1) and (2) (*i.e.*, false statements, omissions, or deceptive conduct in connection with the purchase or sale of a covered security). That interpretation is consistent with the text of Section 77p(c) ("[*a*]*ny* covered class action"), which does not turn on the source of substantive law under which the claims arise. Cf. 15 U.S.C. 77p(b) and (d).

This interpretation is also consistent with SLUSA's structure and purpose. Congress authorized removal of *state-law* class actions under Section 77p(c) because it was unwilling to leave preclusion decisions under Section 77p(b) to state courts alone. The Congress that took that step would not likely have denied defendants access to a federal forum for adjudication of analogous 1933 Act suits. And reading Sections 77p(c) and 77v(a) to permit removal of suits like this one would protect defendants against state-court circumvention of the PSLRA's requirements.

B. This Court's decision in *Kircher* v. *Putnam Funds Trust*, 547 U.S. 633 (2006), does not compel a different result. The district court in *Kircher* determined that the plaintiffs' state-law claims had not properly been removed under Section 77p(c) because the claims did not allege the type of misconduct described in Section 77p(b). This Court held that such a dismissal was properly understood as a dismissal for lack of subject-matter jurisdiction, because "authorization for the removal in subsection (c), on which the District Court's jurisdiction depends, [w]as confined to

cases 'set forth in subsection (b),' § 77p(c), namely, those with claims of untruth, manipulation, and so on." *Id.* at 642. That description is consistent with the government's interpretation of Section 77p(c). Elsewhere in its opinion, the Court stated more generally that "removal and jurisdiction to deal with removed cases is limited to those precluded by the terms of subsection (b)." *Id.* at 643. Read in context, however, that statement is best understood as shorthand for the more precise formulation the Court had given earlier. That contextual reading makes particular sense because *Kircher* involved only state-law claims, and so the variations in phrasing had no practical significance there.

ARGUMENT

The provision directly at issue in this case, 15 U.S.C. 77v(a), defines the jurisdiction of federal and state courts over 1933 Act claims. Section 77v(a) provides:

> The district courts of the United States * * * shall have jurisdiction of offenses and violations under this subchapter * * * and, concurrent with State and Territorial courts, *except as provided in section 77p of this title with respect to covered class actions*, of all suits in equity and actions at law brought to enforce any liability or duty created by this subchapter.

Ibid. (emphasis added). The California trial court held that the italicized language—the "except" clause—did not divest it of jurisdiction over this covered class action, which asserts only claims arising under the 1933 Act.

That interpretation was correct. The "except" clause makes clear that, to the extent Section 77p establishes any limits on the authority of state courts to entertain 1933 Act claims, those limits will supersede the rule of

state-court concurrent jurisdiction that Section 77v(a) announces. But nothing in Section 77p actually "provide[s]" such a jurisdictional limitation. Contrary to petitioners' argument, reading Section 77v(a) to permit state courts to hear suits (like this one) that assert only 1933 Act claims will not undermine SLUSA's goal of preventing plaintiffs from circumventing the PSLRA's substantive and procedural requirements. That is because Section 77p(c), properly construed, authorizes removal of such suits to federal court, where they will be subject to the PSLRA's safeguards.

I. SECTIONS 77p(b) AND 77v(a) ALLOW STATE-COURT JURISDICTION OVER 1933 ACT SUITS

The "except" clause is most naturally read as a limitation on the preceding phrase dealing with the concurrent jurisdiction of state courts. In other words, federal courts "shall have jurisdiction * * * of all suits in equity and actions at law brought to enforce" obligations created by the 1933 Act, and the federal jurisdiction in question shall be "concurrent with" state courts, "except as provided in section 77p * * * with respect to covered class actions." 15 U.S.C. 77v(a). If Section 77v(a) is read in that manner, one would expect Section 77p to limit in some way state-court jurisdiction over covered class actions brought under the 1933 Act.

The operative provision of Section 77p, however, contains no such limitation. Section 77p(b) provides that certain covered class actions "based upon the statutory or common law of any *State* or subdivision thereof" may not be maintained "in any State *or* Federal court." 15 U.S.C. 77p(b) (emphases added). By its terms, that provision addresses only certain class actions brought under state law, and it has no meaningful application to the 1933 Act suits that are referenced in Section 77v(a).

Moreover, Section 77p(b) precludes both state and federal courts from hearing the specified state-law class actions. Section 77p(b) therefore does not limit the concurrent state-court jurisdiction over 1933 Act claims that Section 77v(a) generally provides. Nor does any other provision within Section 77p divest state courts of jurisdiction over any category of 1933 Act claims.

A. Petitioners' Reading Of Section 77v(a)'s "Except" Clause Is Unpersuasive

Petitioners argue (Br. 16) that the cross-reference in the "except" clause refers to the *definition* of "covered class action" set forth in Section 77p(f)(2). That provision defines a covered class action as a suit in which more than 50 people seek damages and common questions predominate; it does not look to whether the action is brought under federal or state law. Under petitioners' approach, the "except" clause divests state courts of jurisdiction over "all suits in equity and actions at law brought to enforce" the 1933 Act that fall within Section 77p(f)(2)'s definition of "covered class action." 15 U.S.C. 77v(a). Petitioners' approach has the virtue of preserving the "except" clause as a limit on the concurrent jurisdiction of state courts, but it does so by ignoring the statutory text.

1. Many federal statutory provisions use the phrase "except as provided in * * * ," followed by a statutory cross-reference. That language is most naturally read as making clear that the cross-referenced provision supersedes, and thus creates an exception to, the more general rule in any circumstance where the two conflict. In the absence of such language, courts would need to employ various canons of construction (*e.g.*, the canon that the more specific statute controls over a more general one, or the canon that the later-enacted statute

takes precedence) to resolve the conflict between the two provisions. Language like "except as provided in * * * " obviates the need to apply those interpretive principles by making clear which of two provisions controls.

That is how Congress has used the phrase ("except as provided") in other sections of the same chapter of Title 15. See, *e.g.*, 15 U.S.C. 77k(f) (announcing a general rule of joint and several liability, "[e]xcept as provided in paragraph (2)," which provides a different liability rule for outside directors); 15 U.S.C. 77p(a) (announcing a general rule that "rights and remedies" under the statute do not displace others that may exist, "[e]xcept as provided in subsection (b)," which precludes certain state-law class actions); 15 U.S.C. 77z-2(c) (announcing a general safe harbor for certain forward-looking statements, "[e]xcept as provided in subsection (b)," which excludes protection for a narrower subset of statements). Indeed, the penultimate sentence of Section 77v(a) uses the phrase in precisely that manner. That sentence had long provided that 1933 Act claims filed in state court may not be removed to federal court, but SLUSA limited that prohibition by stating that the general rule applies "[e]xcept as provided in section 77p(c)." 15 U.S.C. 77v(a). The crossed-referenced provision, Section 77p(c), creates an exception to the general rule of non-removability by permitting removal of certain class actions that are brought under the 1933 Act and that allege specified types of misconduct. See pp. 24-27, *infra*.

Petitioners' reading of Section 77v(a)'s "except" clause does not fit within that pattern. Petitioners argue (Br. 16) that the clause "serve[s] to cross-reference th[e] definition" of "covered class action" that

appears in Section 77p(f)(2). But the "except" clause refers to "section 77p" in its entirety, not to the definitional provision in Section 77p(f)(2). If Congress had intended to cross-reference that definition in particular, it could easily have done so. Cf. 15 U.S.C. 77b(a)(16) (incorporating definition "as provided in section 78c(a)(55) of this title"); 15 U.S.C. 77ccc(2) (incorporating definition "as provided in paragraph (3) of section 2(a) of the Securities Act of 1933").

In any event, petitioners' argument would not be persuasive even if the "except" clause had specifically referenced Section 77p(f)(2). Neither that definition, nor any other language within Section 77p, can colorably be read as "provid[ing]" an exception to the general rule of concurrent jurisdiction over a suit like this one, which alleges only 1933 Act claims. By reading the "except" clause as imposing limits on state-court jurisdiction that are not "provided in" Section 77p itself, petitioners urge a reading of the clause that its language will not bear.

2. In an attempt to bolster their interpretation of Section 77v(a)'s "except" clause, petitioners contend (Br. 16) that their textual argument is "reinforce[d]" by SLUSA's "structure." Petitioners describe SLUSA as separately addressing three different types of covered class actions: (1) those asserting solely claims that arise under state law; (2) those asserting solely claims that arise under the 1933 Act; and (3) "mixed" class actions that contain both 1933 Act claims and state-law claims. Petitioners argue (Br. 17) that the first category (state-law class actions) is addressed by Section 77p(b) and (c). As noted above, Section 77p(b) precludes altogether certain state-law class actions that assert claims for false statements, omissions, or deceptive conduct in

connection with a covered security; and Section 77p(c) permits removal of such a suit from state to federal court. See pp. 2-3, *supra*. Petitioners contend (Br. 17-18) that the third category of covered class actions ("mixed" class actions) is addressed by the penultimate sentence of Section 77v(a), which forbids removal of 1933 Act cases filed in state court "[e]xcept as provided in section 77p(c)." In petitioners' view (Br. 18), Section 77p(c) authorizes removal of a suit "that involves *both* 1933 Act *and* state-law claims," but not of a suit that asserts 1933 Act claims alone.

Given SLUSA's treatment in these provisions of state-law and mixed claims, petitioners infer that Section 77v(a)'s "except" clause should be construed as applying to—and thus excepting from state jurisdiction—claims that arise solely under the 1933 Act:

> If the preclusion provision addresses *state-law* covered class actions, and if the amendment to the anti-removal provision addresses *mixed* covered class actions, then the "except" clause in the jurisdictional provision should naturally be understood to address the only category of covered class actions of federal concern remaining: *1933 Act* covered class actions.

Pet. Br. 18. Any other interpretation, petitioners maintain (*ibid.*), would "leave a gaping hole in the regulatory scheme."

Petitioners' structural argument reflects an accurate assessment of congressional purpose. Congress would not have been content to leave 1933 Act claims "stuck in state court," Pet. Br. 18, where they would not be subject to the PSLRA's substantive and procedural requirements. Petitioners are wrong, however, in reading Section 77v(a)'s anti-removal provision as permitting removal *only* of mixed claims. As explained below, that

provision is best read, along with Section 77p(c), as authorizing removal to federal court of covered class actions that are brought under the 1933 Act and that allege the types of misconduct described in Section 77p(b). See pp. 24-27, *infra*. Upon removal, such a suit would be subject to the "national standards" that SLUSA was designed to ensure. SLUSA § 2(5), 112 Stat. 3227. As a result, there is no gap (let alone a "gaping hole") in the regulatory scheme, and consequently no practical exigency to address through petitioners' strained reading of Section 77v(a)'s "except" clause.

SLUSA's exception to Section 77v(a)'s removal bar is illuminating in another respect as well. Just as the "except" clause contains the phrase "except as provided in section 77p," the penultimate sentence of Section 77v(a) contains the phrase "except as provided in section 77p(c)." Petitioners appear to recognize that, to determine the scope of the exception to section 77v(a)'s anti-removal provision, a court must construe the operative provisions of Section 77p(c) and identify those cases for which Section 77p(c) actually authorizes removal. Yet petitioners would apply a quite different approach to the "except" clause, one that abandons any effort to locate operative language in Section 77p that divests state courts of jurisdiction over suits like this one. There is no sound reason for that disparity.

3. Petitioners' reading of the "except" clause would also entail practical consequences that seem inconsistent with SLUSA's overall structure and purposes.

a. Section 77p(f)(2) defines the term "covered class action" broadly. Indeed, the statutory definition literally encompasses suits that have no connection to securities or securities markets. The operative provisions of Section 77p make clear, however, that Congress did not

view every "covered class action" so defined as a matter of distinct federal concern. Rather, those operative provisions apply not to covered class actions generally, but to particular types of covered class actions. See, *e.g.*, 15 U.S.C. 77p(b) (mandating dismissal of covered class actions that arise under state law and allege specified types of wrongdoing in connection with the purchase or sale of a covered security).

By treating the broad definition of "covered class action" as though it were an operative provision, petitioners' approach would cause the "except" clause to encompass a range of federal suits that in two respects is broader than the range of state-law actions that Section 77p(b) itself precludes. First, the state-law claims that are barred by Section 77p(b) all involve allegations of specified misconduct in connection with the purchase or sale of a "covered security." 15 U.S.C. 77p(b)(1) and (2); see 15 U.S.C. 77p(f)(3) (defining the term "covered security" through cross-reference to 15 U.S.C. 77r(b), which refers generally to securities that are listed on regulated national exchanges). Section 77p(f)(2)'s definition of "covered class action," however, does not limit that term to suits involving covered securities. Under petitioners' approach, the "except" clause therefore would divest state courts of jurisdiction over *all* "covered class actions" that are brought under the 1933 Act, including those that do *not* involve covered securities.

Second, Section 77p(b) bars federal and state courts from adjudicating only those state-law covered class actions that allege "an untrue statement or omission of a material fact in connection with the purchase or sale of a covered security," or "that the defendant used or employed any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered

security." 15 U.S.C. 77p(b)(1) and (2). SLUSA's definition of "covered class action," however, is not limited to suits that allege those forms of wrongdoing. That definition also encompasses, for example, class actions brought under provisions of the 1933 Act that permit a purchaser to sue a seller for offering or selling an unregistered security that is required to be registered. See 15 U.S.C. 77e, 77*l*(a)(1).

Petitioners' approach thus would bar state courts from adjudicating covered class actions under the 1933 Act even in circumstances where comparable state-law class actions could go forward. There is no evident reason that Congress would have wished SLUSA's divestiture of state-court jurisdiction to sweep more broadly with respect to 1933 Act suits than with respect to state-law claims. Those consequences highlight the incongruity of treating Section 77p(f)'s *definition* of "covered class action" as though it "provided" an "except[ion]" to Section 77v(a)'s general rule of concurrent federal- and state-court jurisdiction over 1933 Act claims.

b. Petitioners' efforts to explain the mismatch between the preclusion provision in Section 77p(b) and their reading of Section 77v(a)'s "except" clause are unpersuasive.

Petitioners contend (Br. 29) that the Securities Exchange Act of 1934 (1934 Act), 15 U.S.C. 78a *et seq.*, "reflects a similar approach," because it gives federal courts exclusive jurisdiction of all suits arising under the 1934 Act, see 15 U.S.C. 78aa(a), yet precludes only state-law class actions that involve covered securities, see 15 U.S.C. 78bb(f)(1). The analogy fails, however, because while SLUSA added a preclusion provision to the 1934 Act that mirrors the one it added to the 1933 Act, see § 101(b), 112 Stat. 3230, the 1934 Act has *always* required that

claims arising under that Act be brought in federal court. With respect to the 1933 Act, by contrast, SLUSA added both Section 77p(b)'s preclusion provision and Section 77v(a)'s "except" clause. Under those circumstances, Congress would not likely have written the new provisions in the mismatched manner that petitioners suggest.

Petitioners argue (Br. 29) that "the [PSLRA's] class-action-specific protections apply to all 1933 Act class actions—whether involving covered securities or not—so it makes sense that Congress would make the 'except' clause similarly as broad." Yet the "except" clause is *not* as broad, even under petitioners' reading of it. Whereas the PSLRA's protections apply to all plaintiff class actions arising under the 1933 Act, see 15 U.S.C. 77z-1(a)(1), the "except" clause is limited to "covered class actions." Under petitioners' reading of the "except" clause, SLUSA therefore precludes state-court jurisdiction over only a subset of the class actions that are covered by the PSLRA's protections.

Petitioners contend (Br. 30) that the relative narrowness of the preclusion provision in relation to the "except" clause (as they read it) reflects Congress's respect for "the deeper federalism concerns that preclusion raises." Petitioners are correct that Congress often treads more lightly when foreclosing entirely the availability of relief under state law (as the preclusion provision does) than when choosing the forum in which federal claims may proceed. But petitioners cannot explain why Congress would have chosen to make the "except" clause broader than the preclusion provision in the two *particular* respects identified above.

B. The "Except" Clause Can Reasonably Be Interpreted As Clarifying The Relationship Between Section 77v(a) And Section 77p

1. Under Section 77v(a), federal and state courts may exercise concurrent jurisdiction over 1933 Act claims "except as provided in section 77p * * * with respect to covered class actions." Petitioners identify nothing in Section 77p that even arguably "provide[s]" an exception to the general rule of concurrent jurisdiction over suits, like respondents', that assert 1933 Act claims alone. As a textual matter, the absence of any such statutory language provides a fully sufficient basis for the state trial court's exercise of jurisdiction here, despite the uncertainty as to what problem Congress was seeking to address when it enacted the "except" clause.

2. There are, however, at least two possible explanations for Congress's decision to enact the "except" clause. First, Congress may have been concerned about mixed class actions that contain both 1933 Act claims and state-law claims within the scope of Section 77p(b)—*i.e.*, claims under state law for false statements, omissions, or deceptive conduct in connection with a covered security. Because Section 77v(a) grants concurrent jurisdiction over "all *suits* in equity and *actions* at law" brought to enforce the 1933 Act, 15 U.S.C. 77v(a) (emphasis added), plaintiffs might have argued that Section 77v(a) provides state courts with jurisdiction over mixed class actions in their entirety. The "except" clause reinforces the understanding that state courts may not entertain any state-law claims that are barred by Section 77p(b), even when such claims are asserted along with the 1933 Act claims as to which concurrent jurisdiction exists.

Second, Congress may have added the "except" clause to Section 77v(a) in a more general excess of caution, as a way of ensuring that nothing in the 1933 Act's general jurisdictional provision would be taken to supersede SLUSA's limits on adjudication of state-law claims. Cf., *e.g.*, *Marx* v. *General Revenue Corp.*, 568 U.S. 371, 383-384 (2013) (explaining that language may be included in a statute to "remov[e] any doubt" on a particular point, and citing cases to that effect). That is particularly likely in the context of SLUSA, which was enacted to block "bypass" of the PSLRA. *Kircher* v. *Putnam Funds Trust*, 547 U.S. 633, 636 (2006). Congress could reasonably take that step even if it did not have in mind any particular circumstance in which Sections 77p and 77v(a) would produce conflicting results.

3. Petitioners assert that the two explanations just stated "rest[] on a faulty premise: that Section [77p(b)] itself is a 'jurisdictional' provision." Pet. Br. 40 (citation omitted). Instead, petitioners explain, Section 77p(b) "concerns 'preclusion,' not jurisdiction, so it has no bearing on the concurrent jurisdiction of state courts at all." *Ibid.* (citation omitted). Contrary to petitioners' argument, however, the explanations provided above do not depend on viewing Section 77p(b) as a jurisdictional provision. Rather, they depend on the indisputable fact that *Section 77v(a)* is a jurisdictional provision. Because Section 77v(a) authorizes state-court jurisdiction over at least some "suits in equity and actions at law" that include claims arising under the 1933 Act, Congress may have been concerned that such an authorization would be construed as overriding the limitations imposed by Section 77p(b), at least in cases where state-law claims were also present (*i.e.*, in mixed suits). The "except" clause, by making clear that Section 77p takes

precedence over Section 77v(a)'s grant of concurrent state-court jurisdiction if the two provisions ever conflict, forecloses that possibility.

Petitioners also observe (Br. 41) that Section 77p(b) prohibits federal as well as state courts from hearing certain state-law covered class actions. Petitioners argue (Br. 41-42) that, if Congress had wished to make doubly clear that Section 77v(a) did not supersede those prohibitions, it would not have framed the "except" clause as an exception to concurrent *state-court* jurisdiction alone. But while Section 77p(b) applies in both federal and state courts, other SLUSA provisions manifest Congress's particular concern about potential abuses in state-court securities litigation. That concern is reflected in congressional findings, see SLUSA §§ 2(2) and (3), 112 Stat. 3227 (finding that "a number of securities class action lawsuits have shifted from Federal to State courts," and that "this shift has prevented [the PSLRA] from fully achieving its objectives"), and in Section 77p(c)'s authorization to remove (*inter alia*) state-law covered class actions that the federal court must then dismiss.

4. A congressional directive that a particular rule applies "except as provided in" another law serves to make clear which statute will control in the event that two laws conflict. Congress may enact such language because it has identified particular circumstances where two laws will produce conflicting results. But it may also do so simply to ensure that a particular law is enforced according to its terms, and to eliminate any risk that another law will be construed to supersede it or to prevent its full implementation. Such caution may have been unnecessary in the present context, since

Section 77v(a) would not likely be construed to supersede Section 77p even if the "except" clause were deleted. But neither the uncertainty as to Congress's reasons for enacting the "except" clause, nor the possibility that Congress addressed a non-existent risk, provides a sound basis for giving the "except" clause a more expansive reading than its language will support.

II. SECTION 77p(c) AUTHORIZES REMOVAL TO FEDERAL COURT OF COVERED CLASS ACTIONS THAT ARE BROUGHT UNDER THE 1933 ACT AND ALLEGE THE TYPES OF MISCONDUCT THAT ARE DESCRIBED IN SECTION 77p(b)

Petitioners contend (*e.g.*, Br. 18-19, 25-26) that, unless Section 77v(a)'s "except" clause is read to divest state courts of jurisdiction over 1933 Act suits like this one, SLUSA cannot achieve its purpose of preventing circumvention of the PSLRA's substantive and procedural requirements. Petitioners are correct that the efficacy of those requirements depends on defendants' access to a federal forum. Petitioners are wrong, however, in assuming that the "except" clause provides the *only* statutory mechanism for ensuring such access in 1933 Act suits. SLUSA also established an exception to what had previously been a categorical bar on removal to federal court of 1933 Act suits filed in state court. If SLUSA is properly construed to authorize removal of state-court suits, Congress's policy judgments can be vindicated without adopting petitioners' atextual reading of the "except" clause.[2]

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[2] Because petitioners did not seek to remove this case to federal court, but instead asked the California trial court to dismiss on jurisdictional grounds, the question whether removal under Section 77p(c) would have been permissible is not squarely presented here.

A. SLUSA's Text, Structure, And Purpose Support Reading Section 77p(c) As Applying To Cases Arising Under The 1933 Act

Before SLUSA was enacted, Section 77v(a) categorically barred removal of any "case arising under [the 1933 Act] and brought in any State court of competent jurisdiction." 15 U.S.C. 77v(a) (1994). As amended by SLUSA, however, that removal bar now applies "[e]xcept as provided in Section 77p(c) of this title." 15 U.S.C. 77v(a). Section 77p(c), which was also added by SLUSA, provides in turn that "[a]ny covered class action brought in any State court involving a covered security, as set forth in subsection (b) of this section, shall be removable to the Federal district court for the district in which the action is pending, and shall be subject to subsection (b)." 15 U.S.C. 77p(c).

The determination whether suits like respondents' are removable turns on the meaning of Section 77p(c)'s phrase "as set forth in subsection (b) of this section." That language is best understood to encompass both

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In construing Section 77v(a)'s "except" clause, however, this Court should consider the structure and purposes of the overall statutory scheme. The proper construction of Section 77p(c), and of Section 77v(a)'s anti-removal provision, are particularly relevant to the question presented in two ways. First, petitioners raise a structural argument (Br. 17-18) that is based on their reading of Section 77v(a)'s anti-removal provision as applying only to "mixed" class actions, *i.e.*, class actions that assert both 1933 Act and state-law claims. See pp. 14-16, *supra*. Respondents' argument (Br. 12-13, 23) rests on a similar interpretation of the anti-removal provision. Second, the force of petitioners' concern about the potential for state-court circumvention of PSLRA requirements depends substantially on whether SLUSA provides alternative protections against such circumvention. See pp. 26-27, *infra*. In resolving this case, the Court therefore could provide helpful guidance to lower courts about the scope of Section 77p(c)'s removal authorization.

federal- and state-law suits that allege the type of misconduct described in Section 77p(b)—*i.e.*, "(1) an untrue statement or omission of a material fact in connection with the purchase or sale of a covered security," or "(2) that the defendant used or employed any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security." 15 U.S.C. 77p(b). Read that way, Section 77p(c) would permit removal of covered class actions like this one that arise solely under the 1933 Act, as well as covered class actions that arise solely under state law and "mixed" covered class actions that involve both types of claims.

To be sure, a covered class action is not *subject to dismissal* under Section 77p(b) unless it is "based upon the statutory or common law of [a] State or subdivision thereof." 15 U.S.C. 77p(b). But if Congress had intended to limit removal to state-law claims, it presumably would have made that limitation explicit in Section 77p(c) itself, as it did in the neighboring provisions. See 15 U.S.C. 77p(b) ("No covered class action based upon the statutory or common law of any State or subdivision thereof"); 15 U.S.C. 77p(d)(1)(A) ("a covered class action * * * that is based upon the statutory or common law of the State in which the issuer is incorporated * * * or organized"). That contrast suggests that Congress deliberately chose not to limit removability to claims filed under state law. See *United States* v. *Nordic Village, Inc.*, 503 U.S. 30, 35 (1992) (relying, in construing a provision of the Bankruptcy Code, on "the contrasting language used in subsections (a) and (b) * * * and in subsection (c)").

If Section 77p(c) is construed to authorize removal of respondents' suit, Section 77v(a) poses no barrier to

that result. Before SLUSA was enacted, the penultimate sentence of Section 77v(a) gave 1933 Act plaintiffs their choice of forum by categorically barring removal of 1933 Act suits that were brought in state court. SLUSA amended Section 77v(a), however, to state that the removal ban would apply "[e]xcept as provided in section 77p(c)." The penultimate sentence of Section 77v(a) continues to displace more general grants of removal authority, see, *e.g.*, 28 U.S.C. 1441(a) (authorizing removal of "any civil action brought in a State court of which the district courts of the United States have original jurisdiction"), and thus to preclude removal of *individual* actions brought in state court under the 1933 Act. SLUSA makes clear, however, that Section 77v(a) does not bar removal of any covered class action that is removable under section 77p(c).

Reading Section 77p(c) to permit removal of covered class actions that assert 1933 Act claims, moreover, is more consistent with SLUSA's structure and purposes than a contrary reading. With respect to the *state*-law suits that are precluded altogether by Section 77p(b), Congress authorized removal under Section 77p(c) in order to ensure that the preclusion determination could be made by a federal court if the defendant so requested. The Congress that was unwilling to leave those preclusion determinations to state courts alone would not likely have denied defendants access to a federal forum for adjudication of the merits of analogous 1933 Act claims.

For many covered class actions asserting 1933 Act claims—including this suit—removal under Section 77p(c) would give defendants substantially the same protection against state-court circumvention of the PSLRA's requirements that petitioners' interpretation

of the "except" clause in Section 77v(a) would provide. The most significant practical difference between the two approaches is that petitioners construe the "except" clause to bar state-court adjudication of *all* covered class actions brought to enforce the 1933 Act. Section 77p(c), by contrast, does not authorize removal of covered class actions that do not involve covered securities, or that allege a type of misconduct other than the types described in Section 77p(b)(1) and (2). Cf. pp. 16-18, *supra*. Allowing plaintiffs to litigate such 1933 Act claims in state court, however, is consistent with the congressional policy judgments reflected in SLUSA, because SLUSA does not disturb state courts' authority to adjudicate *state*-law claims having those characteristics.

B. The Government's Interpretation Of Section 77p(c) Is Consistent With This Court's Decision In *Kircher*

In *Kircher*, *supra*, the Court addressed whether "an order remanding a case removed under" SLUSA is appealable under 28 U.S.C. 1447(d), which "bars review of district court orders remanding for lack of subject-matter jurisdiction." 547 U.S. at 636, 638. In the course of its decision, the Court described the relationship between Section 77p(b) and Section 77p(c) in a manner that could be read to suggest that *only* state-law claims that are precluded under Section 77p(b) may be removed under Section 77p(c). Taken as a whole, however, the Court's discussion is fully consistent with a reading of Section 77p(c) that permits removal of covered class actions that assert solely 1933 Act claims, so long as those suits allege the type of misconduct described in Section 77p(b).

1. The plaintiffs in *Kircher* were mutual fund investors who filed class actions in Illinois state courts alleging that misconduct by the defendants had devalued

their holdings. The suits "asserted only state-law claims, such as negligence and breach of fiduciary duty." 547 U.S. at 637. The defendants attempted to remove the suits to federal court on the basis of Section 77p(c), but the plaintiffs "argued that the cases should be remanded for lack of subject-matter jurisdiction." *Ibid.*

The district court agreed that removal was improper. The court determined that the plaintiffs' suit would be removable under Section 77p(c) only if it involved the type of claim "set forth in subsection (b)," which in turn refers to misconduct "in connection with the purchase or sale of a covered security." 15 U.S.C. 77p(b) and (c); see 547 U.S. at 638. "Since the investors were said to have been injured as 'holders' of mutual fund shares, not purchasers or sellers, the District Court reasoned, their claims did not satisfy the 'in connection with the purchase or sale' requirement of the Act's preclusion provision, and the claims could therefore proceed in state court." 547 U.S. at 638 (citation and footnote omitted).[3]

The question for this Court was whether the district court's remand order—which was based on that court's view that the suits did not satisfy the "in connection with the purchase or sale" requirement of Section 77p(b)—was properly characterized as a remand for lack of subject-matter jurisdiction (and hence not appealable under 28 U.S.C. 1447(d)). 547 U.S. at 641-642. The Court concluded that the order was properly so

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[3] This Court later rejected the *Kircher* district court's view of Section 77p(b) in *Merrill Lynch, Pierce, Fenner & Smith Inc.* v. *Dabit*, 547 U.S. 71, 82-88 (2006), where it determined that so-called "holder" claims may satisfy the "in connection with the purchase or sale" requirement.

characterized. The Court explained that "authorization for the removal in subsection (c), on which the District Court's jurisdiction depends, [w]as confined to cases 'set forth in subsection (b),' namely, those with claims of untruth, manipulation, and so on." *Id.* at 642 (citation omitted). The Court concluded that, by determining that the suits failed to allege misconduct "in connection with the purchase or sale" of a covered security within the meaning of Section 77p(b), the district court had necessarily determined as well that the suits were not removable under Section 77p(c). *Ibid.*

The defendants in *Kircher* argued that the district court's removal decision had instead "rested simply on an application of substantive law under subsection (b), law that was not jurisdictional at all." 547 U.S. at 642. They contended that the grounds for removal under Section 77p(c) were "broader" than the grounds for preclusion under Section 77p(b), so that a ruling that the plaintiffs' claims failed to satisfy the "in connection with the purchase or sale" requirement of Section 77p(b) would not necessarily resolve the claims' removability under Section 77p(c). *Id.* at 643. This Court disagreed, however, stating that "removal and jurisdiction to deal with removed cases is limited to those precluded by the terms of subsection (b)." *Ibid.* Given that correspondence, the Court held, "a motion to remand claiming the action is not precluded must be seen as posing a jurisdictional issue." *Id.* at 644.

2. *Kircher*'s treatment of the relationship between Section 77p(b) and Section 77p(c) is consistent with our view that covered class actions asserting claims under the 1933 Act may be removed if they allege the type of misconduct described in Section 77p(b)(1) and (2). The

Court explained, for instance, that removal under Section 77p(c) "[w]as confined to cases 'set forth in subsection (b),' namely, those with claims of untruth, manipulation, and so on." 547 U.S. at 642 (citation omitted). The Court also stated that the "set forth in subsection (b)" language "has no apparent function unless it limits removal to covered class actions involving claims like untruth or deception." *Ibid.*

On the next page of its opinion, the Court described the relationship between Section 77p(b) and Section 77p(c) in a somewhat different manner, stating that "removal and jurisdiction to deal with removed cases is limited to those precluded by the terms of subsection (b)." 547 U.S. at 643; see *id.* at 643-644 ("[R]emoval jurisdiction under subsection (c)" should be "understood to be restricted to precluded actions defined by subsection (b)."). Those statements are best understood, however, as shorthand for the more precise explanation the Court had just given regarding what it means to be "set forth in subsection (b)." *Id.* at 642. The difference between those two articulations of the removal standard had no practical significance in *Kircher*, which involved only state-law claims. See *id.* at 637. And the particular feature of the case that the *Kircher* plaintiffs had invoked as a barrier to removal—*i.e.*, the contention that the alleged misconduct had not occurred "in connection with the purchase or sale" of a covered security—was the type of argument that could just as readily have been made against removal of a class action alleging 1933 Act claims.

In sum, as explained above, Section 77p(c) is best construed to authorize removal of both state- and federal-law covered class actions that allege the kinds of misconduct described in Section 77p(b)(1) and (2), even

though a federal-law suit of that character would not be precluded by Section 77p(b). That construction, which ensures that defendants in such 1933 Act suits will receive the PSLRA's protections, is more faithful to SLUSA's text, overall structure, and purposes than is an interpretation that limits removal to state-law claims. *Kircher* should not be read to foreclose its adoption.

CONCLUSION

The judgment of the California Court of Appeal should be affirmed.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General
MALCOLM L. STEWART
Deputy Solicitor General
ALLON KEDEM
Assistant to the Solicitor General

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